

Small Business Securities Bulletin

A periodic bulletin keeping small businesses informed about current developments in securities law and related matters

SEC Schedule for Rules Implementing Dodd-Frank Provisions; Final Proxy Access Rules, Effectiveness Delayed

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SEC Schedule for Rules Implementing Dodd-Frank Provisions

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Act) became law on July 21, 2010. The Act includes several securities law and corporate governance changes, which we discussed in our April and June 2011 Bulletins, that will be implemented by Securities and Exchange Commission (SEC) rules. The SEC recently published a schedule outlining its planned rulemaking activities over the next ten months with respect to the provisions of the Act falling under its jurisdiction.

Pursuant to the schedule, the SEC intends to propose rules for stockholder votes on executive compensation and golden parachutes (generally known as “say on pay”) this month, and to adopt such rules between January and March of 2011. The SEC plans to propose rules addressing exchange listing requirements for compensation committee independence, compensation adviser independence and conflicts regarding compensation consultants in either November or December and to adopt such rules between April and July of 2011. Thus, it appears that for most SEC reporting companies the only provisions expected to be in place for the 2011 proxy season is say on pay.

Between April and July of 2011, the SEC plans to propose rules addressing (i) disclosure of the relationship of executive compensation to financial performance, (ii) disclosure of the pay of the company's CEO in relation to the median pay of all employees, (iii) disclosure of permitted hedging with respect to an SEC reporting company's securities by employees and directors, and (iv) exchange-listed companies' policies for recovery of executive compensation in connection with accounting restatements ("clawback policies"). The schedule addresses planned rulemaking only through next July, and does not indicate when these rules may be adopted; the Act also does not specify a date by which the SEC must adopt these rules. It is widely believed, however, that final rules with respect to these disclosure requirements will be in place for the 2012 proxy season.

With respect to the Act's revisions to Regulation D under the Securities Act of 1933 for private securities offerings, the SEC plans to propose in either November or December, and to adopt between April and July of 2011, rules to revise the "accredited investor" standard and disqualify certain felons and other "bad actors" from participating in a Rule 506 offering.

The exemption for non-accelerated filers (generally, companies with a public float below \$75 million), including smaller reporting companies, from the auditor attestation of internal control over financial reporting requirement was effective with the Act and did not require SEC rulemaking. However, the SEC has adopted amendments, effective September 21, 2010, conforming its rules and forms to the exemption.

In addition, the SEC has recently adopted rules to implement "proxy access," as authorized under the Act, which are discussed below.

Final Rules Implementing Proxy Access

In August, the SEC adopted final rules implementing "proxy access." Under new Rule 14a-11, SEC reporting companies subject to the federal proxy rules must include in their proxy materials director nominees nominated by a stockholder, or group of stockholders aggregating their holdings, who has owned for at least three years securities that currently constitute at least 3% of the voting power of the company's securities entitled to vote in the election of directors and who otherwise complies with the rule, unless State law or the company's governing documents prohibit stockholders from nominating directors. The number of persons who can be nominated and/or sit on the board pursuant to the rule is limited to the greater of 25% of the board or one director.

Stockholders using Rule 14a-11 to nominate directors must file with the SEC and transmit to the company, between 150 and 120 days of the anniversary of the mailing of the company's prior year's proxy statement (unless no meeting was held the prior year or the date of the meeting has changed by more than 30 days since the prior

year's meeting), a Schedule 14N disclosing prescribed information about the nominating stockholder(s) and nominee(s), most of which would then be included in the company's proxy statement. Stockholders nominating directors for inclusion in a company's proxy statement pursuant to procedures under State law or the company's charter or bylaws would also be required to file and transmit to the company a Schedule 14N that would contain similar information.

Under the new rule, a company may exclude a nominee only if the nominee fails to satisfy the objective independence standards of the applicable stock exchange or the nominee's candidacy or board membership would violate applicable law or exchange requirements. As a result, stockholders utilizing Rule 14a-11 must also comply with any advance notice bylaw that the company has adopted. If a nominating stockholder and the proposed nominee comply with the rule, however, the company has no discretion to exclude the nominee from its proxy materials, including if the nominee would not satisfy the company's own director qualification or independence standards above that required by the applicable securities exchange. Schedule 14N does require disclosure as to whether a nominee satisfies any director qualification standards included in the company's "governing documents," including the company's charter and bylaws, and companies may discuss a nominee's failure to satisfy such standards, including that such failure would preclude the company from seating such nominee, in their proxy statement.

Stockholders who hold their securities for the purpose or effect of changing control of the company, getting more persons onto the board than is permitted under the rule or that have an agreement with the company regarding the nomination of the nominee(s) prior to filing the Schedule 14N cannot use Rule 14a-11.

In addition, under amended Rule 14a-8(i)(8) companies generally may no longer exclude from their proxy materials shareholder proposals seeking to establish procedures for the inclusion of stockholder nominees in a company's proxy materials in addition to Rule 14a-11 (for example, a procedure with a lower ownership threshold or shorter holding period), but proposals that seek to limit the application of Rule 14a-11 would be excludable.

The new rules were scheduled to be effective November 15, 2010, which meant they could be used for meetings in 2011 with respect to companies that mailed their proxy materials for their 2010 annual meetings on or after March 13, 2010. For smaller reporting companies, however, the rule is not scheduled to be effective until November 15, 2013 - generally for the 2014 proxy season. The SEC has stayed the effectiveness of Rule 14a-11, the related amendments and Rule 14a-8, however, pending resolution of the petition for review of Rule 14a-11 filed by the Business Roundtable and the U.S. Chamber of Commerce in the U.S. Court of Appeals for the D.C.

Circuit. Therefore, it is unclear at this time whether the rules will be in effect for the 2011 proxy season, although that currently appears unlikely. If not struck down pursuant to the petition, however, we expect the rule will be effective for small business issuers as scheduled.

About Me

I am a former SEC attorney who also has prior “big firm” experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you. Visit my bio at www.ober.com/attorneys/penny-somer-greif.

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